IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

MONDAY, THE 26TH MARCH 2007 / 5TH CHAITHRA 1929

Crl.Rev.Pet.No. 514 of 1999(A)

CRA.109/1996 of SESSIONS COURT, THRISSUR
CC.127/1993 of JUDL. MAGISTRATE OF FIRST CLASS COURT-II, THRISSUR
.....

REVN. PETITIONER/ APPELLANT/ACCUSED:

SHAJU ALIAS SHAJAN,
S/O. VENGALY VELAYUDHAN,
KODANOOR VILLAGE, THRISSUR TALUK.

BY ADV. SRI. P.K. ASHOKAN
SRI. K.S. SANJEEVKUMAR

RESPONDENT:

STATE OF KERALA, REP. BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

PUBLIC PROSECUTOR SRI. C.K. SURESH.

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 26/03/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

Crl.Rev.Pet.No.514/1999

Order on Crl.M.P.No. 2231/1999 in Crl.R.P.No.514/1999

Dismissed.

26.03.2007 **Sd/- K. HEMA, JUDGE.**

// True Copy //

P.A. to Judge.

smp

K. HEMA, J.

CRL. R.P. No. 514 OF 1999

Dated this the 26th day of March, 2007.

O R D E R

The revision petitioner was convicted and sentenced to undergo simple imprisonment for four months each under Sections 279 and 337 of Indian Penal Code and to undergo simple imprisonment for 18 months each under Sections 338 and 304(A) IPC. Sentences were ordered to run consecutively. The revision petitioner-accused was further disqualified from driving any class of vehicles for a period of five years under Section 20 of the Motor Vehicles Act. The conviction and sentence were passed by the Judicial Magistrate of First Class. In appeal, Sessions Court confirmed the conviction and sentence. Hence, this revision.

2. According to prosecution, on 05.07.1992 at about 4.20p.m, the accused drove the bus along the Thrissur - Irinjalakuda public road from north to south in a rash and negligent manner and in excessive speed so as to endanger human life and as a result of which, he lost the control of the vehicle and it went off the road and fell into a waterlogged paddy field lying on the left side of the bus. 18 passengers including five children died and 47 persons were injured in the accident. The accused was charge-sheeted for offences under Sections 279, 337, 338 and 304(A) IPC.

3. On an evaluation of the evidence adduced by both sides, both the courts below concurred in the finding that the accident occurred because of the rash and negligent driving of the vehicle by revision petitioner. Learned counsel appearing for revision petitioner vehemently contended that several aspects were not considered by the courts below which, if considered would have led the court to take a different view. The first and the foremost aspect is the non-examination of lorry driver. It is also argued that there is no proper investigation in this angle and the lorry driver, as per the evidence, could not be searched out. Had the lorry driver been examined, the court would have had a clear picture of the accident, it is contended.

4. According to learned counsel appearing for revision petitioner, the bus driver had no other option than to take the vehicle to left side, when he found a vehicle coming from opposite side. The petitioner took the vehicle to left side only because he saw the vehicle coming from opposite side. But he had taken special care to see that the bus did not dash against the lorry, which came from opposite side but in that process, he had gone slightly away from the tarred portion of the road, for which the driver cannot be blamed or found fault with, it is argued. It is only natural and normal for any driver to move the vehicle to left side when he sees a vehicle coming from opposite direction and this is all what the driver has done in this case, it is argued.

5. It is also submitted, on the basis of the decision reported in ***Jacob Mathew vs. State of Punjab and another*** **[(2005) 6 SCC 1]** that negligence as referred to in Sections 279 and 304(A) IPC is an omission to do

something. It was argued that both the courts below did not state in judgments as to what was such omission on the part of the driver. The argument advanced is that accused in the circumstances had done all what a driver could, under the circumstances, do and there was absolutely no omission on his part, and therefore, it cannot be said that there was negligence on the side of accused. It is held in the decision cited above as follows.

> " While negligence is an omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do; criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted. A clear distinction exists between "simple lack of care" incurring civil liability and "very high degree of negligence" which is required in criminal cases ..... In order to hold the existence of criminal rashness or criminal negligence it shall have to be found out that the rashness was of such a degree as to amount to taking a hazard knowing that the hazard was of such a degree that injury was most likely imminent. The element of criminality is introduced by the accused having run the risk of doing such an act with recklessness and indifference to the consequences. The negligence to be established by the prosecution must be

culpable or gross and not the negligence merely based upon an error of judgment".

6. From the dictum laid down in the above decision, it is clear that mere error of judgment will not amount to recklessness or negligence. In this case, undisputed facts are that the vehicle which is only a bus had 200 passengers inside it, which is five times more than what is the permitted number of passengers. Most of the witnesses stated that the bus was driven at a high speed, though some stated that it was at moderately high speed. Some others described in some other fashion. But, it is clear from evidence and as seen from the impugned judgments that the driver was driving the vehicle in more speed than what was required at the particular spot. It is not the speed in the mileage meter which counts. It is the speed which, in the circumstances or the situation would make out rashness, though on a national highway, driver may ride the vehicle at a comparatively higher speed, when there are institutions like schools etc., driver is expected to drive the vehicle cautiously at a lesser speed than what is expected in other portions of the road. So also, when the vehicle is going to a very busy area, even speed of 10 kilometers per hour may amount to rashness, depending upon the facts and circumstances of the case.

7. Passengers who were travelling in the bus including conductor of the same bus deposed that the bus was at a high speed. It has to be inferred that the speed which the witnesses were referring to was the speed which was higher than what was required at the relevant spot. It is needless

to say that an ordinary passenger may not be able to assess the speed in kilometers per hour. They can only say that the vehicle was at a high speed, which indicate that it was at a higher speed than what was necessary in the circumstances. Therefore, it has to be concluded that, as both the courts below found, the driver was driving the vehicle in an excessive speed than what is required in that area. There is no reason to interfere in these findings.

8. It is also come out in evidence from the testimony of PW24, conductor of the bus, that the bus used to be driven by the same driver earlier also. So, learned Public Prosecutor strongly argued that petitioner was a person who was acquainted with the lie of the locality. He ought to know the nature of the mud or soil in the area and would be aware of the quantum of care which he should take, at the particular spot. He was driving the vehicle through a paddy field at the time when the incident happened. It is needless to say that the mud would be loose particularly since, it was a monsoon season and it has come out in evidence that there was heavy rain during those days. So when the bus driver drives the vehicle on such a road, he ought to know that if he had taken the bus to the extreme left, by the bank of waterlogged paddy field, in all probabilities, it would have led to an accident, especially when there were lot of passengers in the bus and it is also likely that when the bus gives way to the other bus coming from opposite side, by swerving it, there is every chance of taking the vehicle to the left side.

9. The bus driver appeared to have run this risk and has omitted to take the care which he ought to have taken when he was plying the vehicle in such a locality, particularly since he was aware of the nature of the locality. So what the petitioner omitted to do is, in taking the care, which he ought to have taken in the circumstances of the case, while he was driving the overloaded bus by the bank of a waterlogged area. It is also relevant to note that, as pointed out by lower appellate court, bus had gone 1.40 meters to eastern side of tarred margin and it had only left 90cm to extreme mud road margin by the side of waterlogged paddy field. It is clear that he has gone to left extreme. In this context, appearance of another bus from opposite side, as pointed out by learned counsel appearing for revision petitioner, assumes significance and deserves discussion.

10. It is true that when a vehicle comes from opposite side, driver has to take care to see that the vehicle does not hit the vehicle which is coming from opposite direction. In all probabilities, driver has to take the vehicle to left side to avoid a hit. Therefore, while driver takes care to avoid a hit and takes the vehicle to left extreme, can it be said that it is an error of judgment and the accident occurred due to an error of judgment, following the dictum laid down in the decision cited by learned counsel appearing for revision petitioner? Hypothetically, it could be said that there could be an error of judgment, if a vehicle comes from opposite side and the driver takes the vehicle to left extreme road margin. This is more so, when the driver of vehicle which came from opposite side was not examined. But, does that

omission lead to irresistible conclusion or does it leave a reasonable doubt in the mind of the court that the accident occurred only due to an error of judgment, especially since the other driver was not examined?

11. No doubt that the examination of other driver would have thrown more light to what actually happened in this case. But, no witness in this case had stated that anything was contributed by driver of other vehicle to the accident. In the absence of any such evidence to indicate that driver of other vehicle contributed anything to the incident, it cannot leave any doubt in the mind of court that the other driver had given any cause for the incident or that accident happened due to an error of judgment while the driver was forced to take the vehicle to left extreme in order to avoid hit with other vehicle etc. As both the courts below found that accident occurred due to rash and negligent driving of vehicle and consequences followed and on going through the judgments and the records, I do not find any perversity in any of the findings.

12. Of course, learned counsel appearing for revision petitioner pointed out that there is an observation made by lower appellate court that the court is not adverting to the details of evidence and hence the evidence was not properly appreciated. But, from a reading of the same paragraph in the judgment it is clear that the court only meant that it was unnecessary to advert specifically to the oral evidence of each of the witnesses. Though the court has not specifically referred to the evidence of each and every witnesses on the relevant facts in detail, what facts weighed in the mind of

the court to arrive at a conclusion are clearly reflected in the judgment. Therefore, I do not find that such observation has to be taken into account seriously so as to make a conclusion that court below had not gone through the evidence at all. I am satisfied that the conviction passed by court below is sustainable and hence there is absolutely no reason to interfere.

13. The trial court passed the sentence to run consecutively. But, in appeal it was ordered to run concurrently. Regarding sentence, it was argued that 18 months is excessive. But, on going through the judgment, I find that trial court had ordered that sentences shall run consecutively, presumably taking into consideration, the several lifes which were taken away in the incident and number of persons who were injured, the nature of the injuries sustained etc. Learned counsel appearing for revision petitioner also submitted that he had not applied for suspending sentence, regarding suspension of driving licence. Hence, revision petitioner was not driving the vehicle for the past five years. It is submitted that he had even stopped driving the vehicle, after the incident, which resulted in such a great misfortune. Learned counsel appearing for revision petitioner also submitted that sentence may atleast be reduced reasonably, taking into consideration that the maximum sentence to be imposed in a case falling under Section 304(A) IPC is only two years.

14. It is also pointed out that sentence may be converted into fine or sentence of imprisonment may be reduced. Taking all these facts into consideration, I think that some reduction in sentence can be ordered. The

sentence is modified in supersession of sentence imposed by trial court and hence revision petitioner is sentenced to undergo imprisonment for one year under Section 304-A IPC, which sentence shall run concurrently with other sentences.

This revision petition is partly allowed.

K. HEMA, JUDGE

smp